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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. 346

HICKMAN GARMENT COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. .....

HICKMAN GARMENT COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Hickman Garment Company, petitioner herein, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit, entered in this case on April 17, 1969, granting enforcement of an order issued against Petitioner by the National Labor Relations Board.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, pp. A1-A2) is reported at 408 F.2d 684. The findings of fact, conclusions of law and order of the National Labor Relations Board are reported at 172 NLRB No. 118 (App., infra, pp. A2-A47).

JURISDICTION

The decision of the Court of Appeals was rendered on April 17, 1969 (App., infra, pp. A1-A2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(e).

QUESTION PRESENTED

(1) Whether employees who violate a lawful plant rule and appropriate an area of the plant barred to them and refuse to return to work after being instructed to do so even after their grievance has been rejected are engaged in protected concerted activities?

STATUTES INVOLVED

The National Labor Relations Act, as amended (61 Stat. 136; 72 Stat. 945; 73 Stat. 544; 29 U.S.C. § 141 et seq.), insofar as is here pertinent, provides:

Section 7.

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choos-

ing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Section 8.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

STATEMENT OF THE CASE

I.

The Facts

A. The elimination of the afternoon break and the resulting aftermath.

Petitioner, Hickman Garment Corporation, is engaged in the production of raincoats for the United States Department of Defense (App., infra, p. A9). Effective February 1, 1967, the Petitioner eliminated an afternoon break period for its employees as a result of an increase in the Federal statutory minimum wage law. This action was necessitated because the Petitioner was faced with a financial crisis. A notice to all employees was posted announcing the elimi-

nation of the break effective February 1, 1967 (App., infra, pp. A6-A7). The Respondent found that the decision to eliminate the afternoon break was not violative of any provision of the National Labor Relations Act (App., infra, p. A24).

The afternoon break previous to February 1, 1967, was taken in four sections. Apparently the first section did not take an afternoon break on February 1.

Some of the employees who had previously been assigned to the second break section took a break in the lunchroom. Philip Roseman, Petitioner's President, upon hearing of this went to the lunchroom and found the employees drinking cokes and smoking. Roseman informed the employees that their actions constituted a wildcat strike and mutiny, and that he was going to discharge the participants, but right at that moment, to return to their machines. The employees left the lunchroom and returned to their machines. After the employees returned to their work stations Roseman barricaded the lunchroom by placing benches across the lunchroom door to prevent any further work stoppage (App., infra, pp. A9-A10).

Later that afternoon a number of the employees who had previously taken their break on the fourth break period tore away the barricade erected in front of the lunchroom and entered the lunchroom and proceeded to take their break which had been eliminated. Roseman upon hearing of the employees' actions returned to the lunchroom. A heated discussion ensued, several employees expressing dissatisfaction that their break had been eliminated, Roseman rejected the grievance and ordered the employees back to work—they refused—Roseman then terminated the employees (App., infra, pp. A10-A12, A30).

II.

The Board's Decision and Order

The Board adopted the findings, conclusions and recommendations of the Trial Examiner (App., infra, pp. A46-A47). The Trial Examiner found that the employees' actions heretofore set forth constituted protected concerted activities thereby immunizing them from discipline. The Trial Examiner relied exclusively upon this Court's decision in *N.L.R.B.* v. *Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962), where this court held that employees who ceased all work and left the plant due to its intolerably cold condition were engaged in protected concerted activity (App., infra, p. A17). In *Washington Aluminum*, supra, the employees, who did not have a bargaining agent, struck. The protected activities of the employees in *Washington Aluminum*, supra, differ from those in our case materially. Here the employees neither worked nor struck, they created a situation which we submit was neither work nor strike. They simply appropriated an area of the plant barred to them for their own purposes refusing to return to work upon request after their grievance was denied (App., infra, pp. A30-A31).

The Board also found that the Petitioner committed other violations of Section 8 (a) (1) of the Act. These findings are not in issue here. The Board further found that the Petitioner violated Section 8 (a) (3) and (1) of the Act by terminating two employees. All of these violations occurred after the critical date in issue.

III.

The Decision of the Court of Appeals

The Court of Appeals enforced the Board's order per curiam. It stated that the Board's decision was supported

by substantial evidence on the record considered as a whole (App., infra, pp. A1-A2).

REASONS FOR GRANTING THE WRIT

Recurring litigation at an increasing tempo has arisen under the National Labor Relations Act with respect to whether unorganized employees who engage in various forms of work stoppages are engaged in concerted protective activities within the protective umbrella of the National Labor Relations Act. The decisions of the Court of Appeals are in conflict, and a decision by this Court on such an important question is critical to the administration of the National Labor Relations Act.

I. The Decision Below Is in Conflict with a Decision of the United States Court of Appeals for the Fifth Circuit

In *Dobbs Houses, Inc.* v. *N.L.R.B.*, 325 F.2d 531 (CA 5, 1963) the Court of Appeals for the Fifth Circuit had occasion to consider whether the discharge of waitresses who struck because of a discharge of a supervisor was protected concerted activity, the Court answered in the negative. The Board there, as it did here, relied almost exclusively on this Court's decision in *N.L.R.B.* v. *Washington Aluminum*, supra. The Court held:

> "The Board urges that a strike is not rendered unprotected because of the availability to the employees or other concerted activities short of striking . . . (or) the reasonableness or wisdom of their selection of a particular course of action." In support of this position the Board cites N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9 and N.L.R.B. v. Mackay Radio & Telegraph Co, 304 U.S. 333. The reasonableness of a course of action must be determined initially to ascertain whether in fact it is protected. (Citations omitted).

"The course of the employees grievance must be considered in determining the reasonableness of their course of conduct undertaken in protest. We have not here reached the state of Washington Aluminum. There the men were working under intolerably cold conditions. Without a union or grievance procedure, concerted activity to protect took the form of a walkout. The conditions there were within the proper realm of employee entered, and the walkout while extreme under the circumstances was reasonably related to the complaint."

II. The Decision Below Is in Conflict with a Decision of the United States Court of Appeals for the Eighth Circuit

In *N.L.R.B.* v. *Montgomery Ward & Co.*, 157 F.2d 486 (CA 8, 1946) the Court of Appeals for the Eighth Circuit reversed a Board decision where the Board had found a violation of the Act where the Employer discharged several employees who refused to perform certain assigned duties. The Court held:

"Moreover while Slanko, Gaylord and Sullivan had the right to go on strike, 'they could not continue to work and remain at their positions, accept the wages paid to them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse, openly or secretly, to the employer's damage to do their work.'"

In our cause the employees decided "when" they were going to perform their assigned tasks, ignored a directive to return to work after their grievance was denied, remained assembled in a part of the plant barred to them, violated a lawful plant rule and all the while accepting the wages paid to them. What choice does an employer have when faced with such a situation if the Board's view be accepted? We submit only one, accept the demands he is faced with.

III. The Decision Below Is in Conflict with a Decision of the United States Court of Appeals for the Seventh Circuit

In *C. G. Conn, Ltd.* v. *N.L.R.B.*, 108 F.2d 390 (CA 7, 1939), the Court of Appeals found that employees who refused to work overtime and walked out of the plant and then wanted to return to work the next morning did not engage in protected concerted activities. The Court stated:

> "We are of the opinion that the facts in the instant situation do not bring the discharged employees within this or any other definition of the word 'strike' of which we are aware. We are unable to accept respondent's argument to the effect that an employee can be on a strike and at work simultaneously. We think he must be on the job subject to the authority and control of the employer, or off the job as a striker, in support of some grievance."

Further:

> "We are aware of no law of logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in their instance. It is not a situation in which employees work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment."

The Board in the instant cause invoked the protective umbrella of *Washington Aluminum,* supra, to immunize the employees from discipline. But we submit the Board's position is untenable; *Washington Aluminum,* supra, protects employees who strike. Here the employees did not

strike. As the Seventh Circuit said an employee cannot "be on a strike and at work simultaneously." Either the employee remains on the job subject to the authority of the employer or off the job as a striker. Here, in our cause, the employees remained on the "job" after being directed to return to work after their grievance was denied. By no logic can they be said to be on strike within the framework of *Washington Aluminum*, supra.

IV. The Decision Below Is in Conflict with a Decision of the United States Court of Appeals for the Fourth Circuit

In *Home Beneficial Life Ins. Co.* v. *N.L.R.B.*, 159 F.2d 280 (CA 4, 1947), cert. den. 332 U.S. 758, the Company had a rule which required insurance agents to report to their district office each morning before beginning their outside work. A number of employees through concerted activity refused to obey the reporting rule and were discharged. The Court held:

> "The Statute (S 7), expressly recognizes the right of employees 'to engage in concerted activities' but does not and could not confer upon them the right to engage in masse in unlawful activities, or to defy the authority of the employer to manage his business while remaining in his service."

The Court also cited and relied heavily on the Seventh Circuit's decision in *C. G. Conn, Ltd.* v. *N.L.R.B.*, 108 F.2d 390.

V. The Decision Below Is in Conflict with a Decision of the United States Court of Appeals for the Third Circuit

In *McNeely & Price Company* v. *N.L.R.B.*, 106 F.2d 878 (CA 3, 1939), the Court of Appeals for the Third Circuit

held that employees who participated in a sitdown were not engaged in protected concerted activities. Two elements present in *Fansteel* were absent in this case (1) the employer did not discharge the employees during the sitdown, and (2) the strike was not marked by violence. The Court expressly found the case governed by this Court's decision in *Fansteel.*

Long ago this Court held in *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), that employees who engaged in a sitdown strike were not engaged in protected concerted activities. This Court stated:

> "Here the strike was illegal in its inception and prosecution."

But the Board relies on this Court's decision *Washington Aluminum,* supra, *Fansteel,* supra, is inoperative, *Washington Aluminum,* supra, cannot be applied we respectfully submit because the catalyst for its application is missing—namely a strike. In *American Shipbuilding Co.* v. *N.L.R.B.*, 380 U.S. 300 (1965), this Court held:

> "The right to strike as commonly understood is the right to cease work—nothing more;" and ". . . a strike . . . which is 'partial' is . . . unprotected."

The Decision of the Board sustained per curiam by the Sixth Circuit must mean that employees who are dissatisfied with a plant rule may (1) appropriate an area for their own use which has been barred to them (2) refuse to return to work upon request and continue to be paid (3) work upon conditions prescribed unilaterally by them, and (4) violate a lawful plant rule. Here the grievance was denied and the employees still refused to return to work after being requested to do so. The employer under the rule promulgated in this case cannot we submit continue to operate his business unless he acquiesces to the em-

ployees' demands for he cannot, the Board says, resort to discharge in order to replace them with employees who will work.

VI. The Position Taken by the National Labor Relations Board in Its Brief to the Eighth Circuit Cannot Be Reconciled with the Board's Position in the Instant Cause.

Presently pending before the United States Court of Appeals for the Eighth Circuit is a case styled *First National Bank of Omaha* v. *National Labor Relations Board* (No. 19,356), wherein the Board in its brief to the Court stated:

> "Work stoppages which are 'partial,' 'intermittent,' or 'recurrent' have been held unprotected because they produce 'a condition that (is) neither strike nor work.' Thus, the Board and the courts have deemed it an 'indefensible tactic for employees to refuse to work on the terms prescribed by their employer, and yet to remain on their jobs and thus deny their employer the opportunity to replace them with workers who will accept these terms." (App., infra, p. A50).

The Board stated further:

> "Here, however, the employees walked out instead of remaining on their jobs and engaging in a partial strike. It was therefore unnecessary to discharge them in order to clear the way for replacements." (App., infra, p. A51).

The Board, we respectfully submit, has taken a position in its brief to the Eighth Circuit which cannot be reconciled with the Board's position in our cause. We earnestly and respectfully submit that the Board's brief heretofore discussed supports our position.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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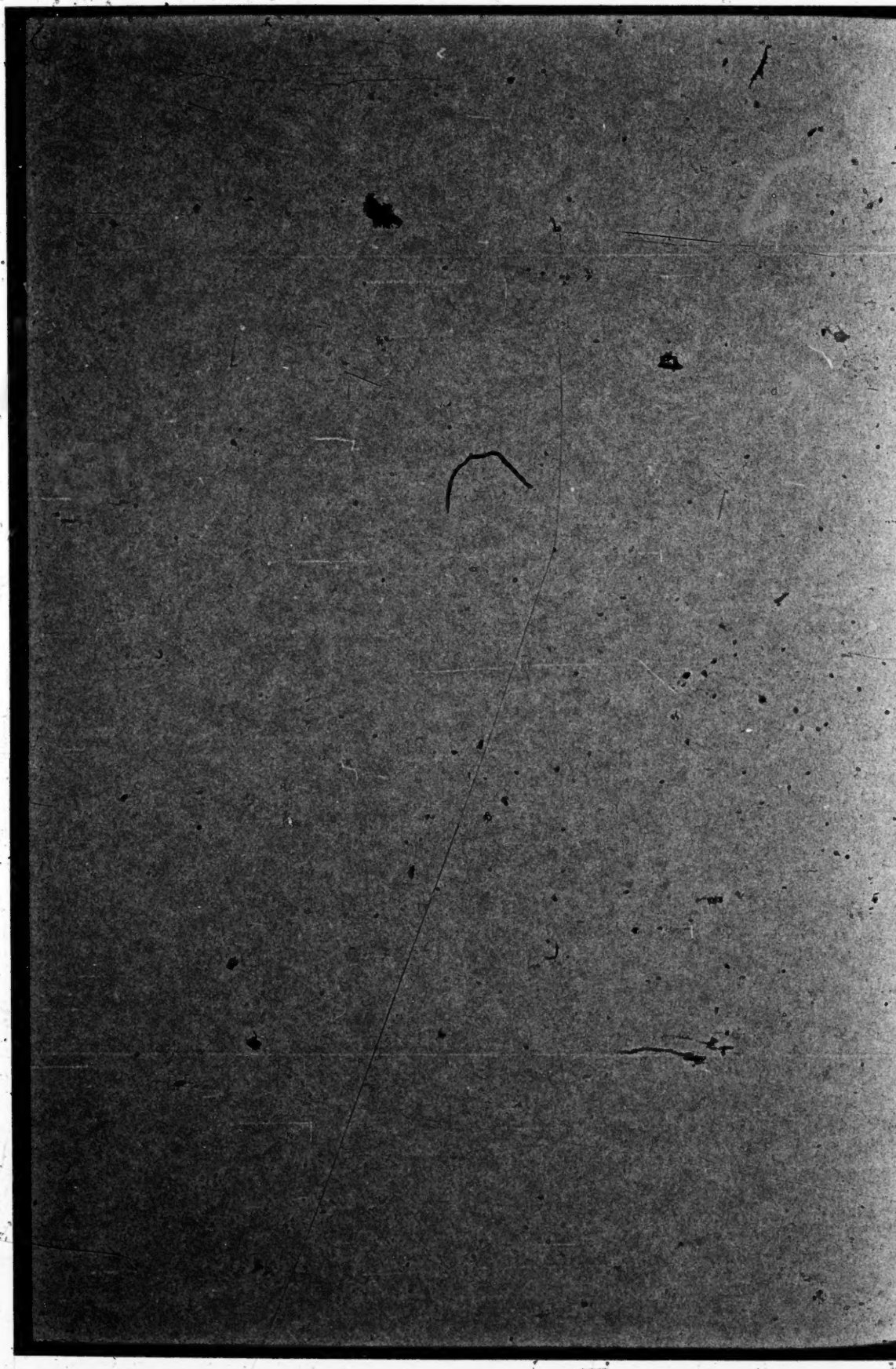

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 18,856

HICKMAN GARMENT CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ORDER

(Filed April 17, 1969)

Before PHILLIPS, CELEBREZZE and PECK, Circuit Judges.

This case is before the Court upon the petition of Hickman Garment Corporation to review and set aside an order of the National Labor Relations Board. The Board has filed a cross-petition for enforcement. The decision and order of the Board are reported at 172 N.L.R.B. No. 118.

Upon consideration of the briefs and record and after hearing oral argument, the Court concludes that the deci-

sion of the Board is supported by substantial evidence on the record considered as a whole.

It is ORDERED that the decision of the Board be and hereby is enforced.

Entered by order of the court.

/s/ Carl W. Reuss
Clerk

TRIAL EXAMINER'S DECISION

Statement of the Case

MAX ROSENBERG, Trial Examiner: With all parties represented, this case was tried before me in Hickman, Kentucky, on November 1 and 2, 1967, on complaint of the General Counsel of the National Labor Relations Board and the answer of Hickman Garment Company, herein called the Respondent.[1] The issues posed by the pleadings are whether Respondent violated Section 8 (a) (3) of the National Labor Relations Act, as amended, by laying off or terminating various employees and refusing to recall or reinstate some of them because of their activities on behalf of the Amalgamated Clothing Workers of America, AFL-CIO, herein called the Union, and whether Respondent independently violated Section 8 (a) (1) by certain conduct to be detailed hereinafter. At the conclusion of the hearing, the parties waived oral argument. Briefs have been received from the General Counsel and the Respondent, which have been duly considered.

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1. The complaint, which issued on July 27, 1967, is based upon charges and amended charges filed on April 3, and April 21, 1967, respectively, and were served on April 4 and April 26, respectively.

Upon the entire record made in this proceeding and my observation of the witnesses, including their demeanor while testifying on the stand, I hereby make the following:

Findings of Fact and Conclusions

I. The Respondent's Business

Respondent, a corporation duly organized under the laws of the State of Kentucky, maintains a plant in Hickman, Kentucky, where it is engaged in the manufacture of clothing and garments. During the annual period material to this proceeding, and in the course and conduct of its business operations, Respondent sold and shipped products valued in excess of $50,000 directly to points located outside the State of Kentucky. The complaint alleges, the answer admits, and I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Amalgamated Clothing Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

The complaint alleges that Respondent terminated 19 employees[2] between February 1 and April 6, 1967,[3] and

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2. These are: Beverly Callison, Katy Adams, Christine Levy, Frankie Williams, Peggy Bing, Alice Merryman, JoAnn Burchman, Geneva Duty, Lavada Mansfield, Ed Bing, Shelby Parnall, Shirley Callison, Jimmy McClure, Pat Lowery, Glenda Edgin, Claudia Bing, Nita Stowe, Doris Aquino, and Maycel Phipps. At the hearing and by stipulation of the parties, the name of Myron Graham was stricken from the complaint.

3. Unless otherwise indicated, all dates fall in 1967.

failed to recall or reinstate certain of them, because of their sympathy for and activities on behalf of the Union or because they engaged in protected, concerted activities, and thereby violated Section 8 (a) (3) and (1) of the Act. It further alleges that Respondent, in violation of Section 8 (a) (1), interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7, by threatening to close its plant because the employees engaged in protected, concerted activities; by instructing its employees not to report their concerted activities or complaints to the National Labor Relations Board; by distributing antiunion handbills and literature which, *inter alia*, threatened that the employees would be caused trouble, possible violence, and loss of paychecks and jobs if they selected the Union to represent them; by promising its employees increased benefits, including free ambulance service, better insurance, a new lunchroom, and extra holiday benefits in order to wean them away from the Union; by coercively interrogating its employees; by requesting employees to solicit other employees to renounce the Union; and, by threatening employees who had engaged in a strike that they would be prevented from drawing unemployment benefits for having done so. Respondent generally denies the commission of any unfair labor practices.

Respondent's plant here involved is located in Hickman, Kentucky. Phillip Roseman is the president of this installation, and his wife, Nettie, is the secretary. Another factory situated in Ridgely, Tennessee, some 35 miles distance, which is managed by Nettie Roseman, is similarly owned by the Rosemans who are the principal officers of that entity. James Holcomb occupies the position of plant manager at Hickman and William Tony is the foreman. The parties agree and I find that the foregoing individuals are

supervisors within the meaning of the Act.[4] During the times material herein, the Hickman factory was engaged in the production of military raincoats under contract with the United States Defense Supply Agency, and operated with a work force of between 250 and 260 employees.

Beverly Callison testified without contradiction and I find that the Union's campaign to organize Respondent's plant was initially launched during the first week in January when approximately five or six employees, including Callison, circulated a petition among the employees at the factory to determine whether they desired to form or join a labor organization. Although quite a number of employees signed the petition indicating that they favored such a development, Callison and her cohorts destroyed the document and solicited organizational sentiment verbally because they feared that their supervisors had observed their activity and might discharge them for engaging in it. On the evening of January 31, the Union conducted its first meeting at Callison's home which was

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4. The General Counsel contends that Mildred Glidewell, Ruth Yates, and Dorothy Argo also are statutory supervisors whose statements and conduct are binding upon Respondent. It is undisputed on this record and I find that the duties and responsibilities of these ladies are identical and that, in the course of their workday, they are authorized to and do grant time off to employees and rehire them without prior consultation with the other officials of the Company, that employees are informed upon hire that these individuals are supervisors, that this trio exercises independent judgment in the direction and assignment of work, that they reprimand employees, and that they attend supervisory meetings. Moreover, Ruth Yates and Mildred Glidewell, when called to the stand by Respondent, readily admitted that they were supervisors, and Nettie Roseman confirmed that, at least, Glidewell "is one of our supervisors." Accordingly, I find and conclude that Glidewell, Yates, and Argo are supervisors within the purview of Section 2(11) of the Act and that Respondent is accountable for their activities. See *Wilder Finishing Co., Division of Jervis Corp.*, 138 NLRB 1017, 1018.

attended by four employees. Agents of the Union explained the need for collective representation to the assemblage and authorization cards were distributed to them with the instruction that they were to obtain the signatures of their fellow employees. Callison and one or two of the plant personnel in attendance at this meeting executed their designations that evening.

Callison further testified without denial and I find that, on her way to work on February 1, she procured signed cards from several employees. During her morning break, Callison walked to the door of the plant with two other workers where she solicited their signatures while she enjoyed a coke and a cigarette. At this juncture, Phillip Roseman approached her and stated that she was not permitted to remove cokes from the plant.[5] Whereupon, Callison retrieved the card which one of her fellow workers had just signed, placed it in her handbag, and returned to the production area. During her lunch break, Callison continued to enlist the support of employees for the Union. In all, she spoke to 28 or 29 of them by lunchtime and obtained between 20 and 25 signed authorizations. She was assisted in this activity that morning by approximately 10 or 12 other solicitors, including Alice Merryman.

Respondent's workday begins at 7:30 a.m. and terminates at 4:15 p.m., with a 45-minute lunch break which extends from 11:45 a.m. to 12:30 p.m. In addition, for almost 12 years Respondent had afforded its employees a 10-minute rest break both in the morning and in the afternoon, which were divided into four periods. However, by a notice dated January 31, Respondent announced that:

> "Beginning Wednesday, February 1st, all afternoon breaks and rest periods will be discontinued. This

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5. It is undisputed and I find that Respondent forbade the taking of coke bottles outside the confines of the plant.

decision was made after much consideration and thought. The price of our garments is based on the old minimum wage standards. The new national wage affords us very little room for any breaks or interruptions which hampers our production schedules. In other words every minute counts during our daily efforts. The regular morning break will still remain in effect. . . ."

Phillip and Nettie Roseman testified that, because of difficulties which they had been experiencing at the Hickman and Ridgely plants concerning the quality of the work being performed which caused a severe financial drain, and because of the impending increase in the Federal Minimum Wage scheduled for February 1, they discussed the feasibility of eliminating the afternoon break at both plants. According to Nettie Roseman, this discussion took place on or before January 29 because it was decided to post a notice at the Ridgely installation on January 30 announcing the cancellation of the post-noon break, and to post a similar notice at Hickman on February 1.[6] Phillip Roseman testimonially conceded and I find that he did not provide advance notice to Hickman employees that the afternoon break would be curtailed on February 1.

News of the elimination of the afternoon rest period quickly came to the attention of the employees on February 1 and this intelligence triggered the incidents which gave rise to this litigation. Alice Merryman, who had been employed by Respondent for 8 years during which she en-

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6. Phillip Roseman claimed that he personally drafted and typed the notice and pinned it to the bulletin board on January 28 or 29. Certain employees called to the witness stand testified that the announcement was first posted on January 31, while still others stated that they observed the notice for the first time on February 1. In view of the findings hereinafter made and the conclusions drawn therefrom, I deem it unnecessary to resolve this conflict.

joyed an afternoon coke respite, testified that she had signed a union authorization card at lunchtime on February 1 at the request of Beverly Callison. Upon learning that the break had been taken away, she and 33 fellow employees who shared the same rest period decided to proceed to the lunchroom "To take our break and to talk to [Roseman] and ask him why he was taking our break away from us." It is Merryman's uncontroverted testimony and I find that, when her supervisor Eddie Mayo learned of this proposed action, the latter remarked that "He hoped that we took that break, that we deserved it and it would serve the Company right if we took it." As Merryman and her cohorts approached the lunchroom, they noticed that the entrance was barricaded by benches and that Roseman and Supervisor William Tony were standing in front of the ladies' room blocking ingress. The employees thereupon removed the benches and entered the eating place, explaining that they did so in the belief that Roseman was more likely to discuss the matter in that locale. After they gained entrance to the lunchroom, Roseman made his appearance and "started flinging his hands around and telling us that we were committing mutiny and was acting like we was on strike. Somebody asked him why he was taking the break away from us," to which he replied that there was nothing left to discuss because he had already made his decision to eliminate the rest period as evidenced by the notice which he had posted in the plant. Merryman protested that she did not believe it was fair for Respondent to deprive them of the rest period after so many years of its enjoyment. Roseman then warned that he was going to bring a legal suit against the employees. When one of the girls inquired why he deemed it necessary to pursue this course of action, Roseman exclaimed that "we was acting like we was on strike, and committing mutiny, and going against the Federal Government contract, . . . and

that he was going to call the Federal Government,"[7] and Merryman retorted "Well, while you're at it call the National Labor Relations Board." This remark angered Roseman and, looking at Merryman, he asked for the number of her timeclock card. After obtaining it, he punched the card and informed her that "You're fired." As Merryman began to leave the room, Roseman inquired as to her destination. After she rejoined that she wished to pick up her purse and snips at her machine, he stated "Hurry up and get out."

Merryman's testimony concerning the events which transpired on February 1 was generally corroborated by other employees. Thus, JoAnn Burchman, who signed a union card on February 1 at the solicitation of Beverly Callison, averred that she and several other employees observed the notice curbing the afternoon rest period while they were taking their morning break and this caused considerable commotion in the plant later in the day. According to Burchman, "Just about everybody didn't want [the elimination of the break], but some of them were just afraid to stand up for their rights and go to talk to the man about it." With the blessings of Supervisor Mayo, and after discussing the matter among themselves, Merryman and other employees decided to force the issue and meet in the lunchroom for this purpose because it was difficult to meet with Roseman in his office due to the fact that a "Do Not Disturb Sign" usually was hung on the office window. The employees ventured into the lunchroom where they were met by Roseman who ordered them to return to work. The employees persisted, however, and removed some benches which blocked the door and

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7. Roseman had apparent reference to the fact that Respondent was engaged in performing work under contract with the United States Defense Supply Agency which it obtained in 1966.

gathered in that room. Roseman entered and excitedly asked, "Just what do you think this is?" The girls replied that he should calm himself and that they simply desired to discuss the elimination of the break with him, that "We wanted our break back, it wasn't fair." Roseman countered that there was nothing to discuss because the decision had already been made to abandon the rest period, proclaimed that the employees were engaged in a mutiny, and threatened to summon a "Government man." When Alice Merryman suggested that he contact the National Labor Relations Board while he was at it, Roseman stated "No, there is no use in that. It's just a family discussion." Roseman once more directed the girls to return to work, but they again demurred, demanding that he discuss the restoration of the break, whereupon he terminated the meeting by stating "There is nothing to talk about. You're fired," and he proceeded to clock the employees out.

Doris Aquino, who had signed a union authorization card for Merryman on February 1, related that she visited the lunchroom that afternoon and heard Roseman shouting that the girls were mutinous by leaving work and insisting upon the retention of the work break. When mention was made of the Board, Roseman pleaded that "We would get him in trouble" if the employees utilized the services of that Agency. After the employees insisted that their grievance over the elimination of the rest period be aired, Roseman flatly refused and shouted "You are all fired." Turning to Aquino, he ordered her to "Clock your card." Aquino replied, "No, sir. If I'm fired, you clock it," whereupon Roseman did so.

Laura Kaye (Katy) Adams testified that she signed a Union card at lunchtime on February 1 at the request of Alice Merryman. Later that afternoon, she and approximately 20 fellow workers jointly decided to meet in the

lunchroom to discuss the loss of the break with Roseman. When they arrived in the room, Roseman was gesticulating wildly and shouting "This is a mutiny. It's a mutiny." At this juncture, Merryman pleaded with him to "wait a minute, calm down. We'd like to speak to you about getting our break back." Roseman shot back that there was nothing to discuss because the decision had already been made, and warned that "I am going to sue you." When one of the girls inquired as to the basis for the suit, Roseman stated that "If the Labor Board gets ahold of what has happened I may lose my Government contracts." Roseman repeated that the girls had staged a mutiny and threatened to call the "Government men and have some of them come down here," at which point Merryman invited him to contact the National Labor Relations Board. Roseman replied, "No, there is no need to get them involved. It's just a little family squabble that we can settle among ourselves."[8] Once more, the girls implored Roseman to compose himself and discuss the matter of the lost rest period with them "because we felt like we deserved our break in the afternoon because we worked as hard as anyone." Roseman responded by shouting "You are all fired," and then pro-

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8. The complaint alleged that Respondent violated Section 8(a)(1) "in telling employees that they should not report their concerted activity or complaints to the National Labor Relations Board." This allegation has reference to the testimony of Jo Ann Burchman and Katy Adams that, when Alice Merryman suggested that Roseman contact the Board as well as the Defense Supply Agency, Roseman stated "No, there is no need to get them involved. It's just a little family squabble that we can settle among ourselves" and "No, there is no use in that. It's just a family discussion." While Roseman denied that he made these statements, I do not credit the denial. However, I am hard pressed to understand just how these comments, made in response to the employees' suggestion, can be construed as an illegal instruction to employees not to convey their complaints to the Board. I shall therefore dismiss this allegation from the complaint.

ceeded to obtain the timeclock numbers of the employees and time punched the cards as each employee left the plant.

Claudia Bing, the wife of employee Ed Bing and the mother of employee Peggy Bing, recounted that she joined one of the groups which took an afternoon break in the lunchroom on February 1. She testified that she was unaware that the rest period had been curbed at the time and that Roseman did not make an appearance in the room while she was there. After she learned that the break had been eliminated, and after observing that her fellow employees were being clocked out because of the latter's protest about the new working conditions, Claudia Bing pulled her timecard and placed it on a bench with the cards of these employees and left the plant with them. According to this witness, she was not told by any official that she had been discharged when she quit work. It is Claudia Bing's testimony, however, which is undenied and which I credit, that the only reason for her leaving work on February 1 was to protest Respondent's curtailment of the break on that date and to join the dischargees. Finally, she credibly testified that her husband Ed joined her in the walkout and that he had not been terminated by Respondent on that afternoon.[9]

It is Peggy Bing's testimony, undenied and credited, that she took her afternoon break on February 1 and visited the ladies' room. When she emerged, she was met by Roseman who asked her where she was going. Peggy replied that she was in the process of returning to her sewing machine, whereupon Roseman informed her "No you are not. You are fired." Roseman then obtained her

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9. In his testimony, Phillip Roseman acknowledged that he was told by Ed Bing that the latter was walking out because "If the others are leaving I have to go along with them," and Plant Manager Holcomb testified in a similar vein.

clock number and punched her out. Peggy Bing stated that she entered the ladies' room in protest of the elimination of the afternoon rest period.

Shirley Callison, the sister of Beverly Callison, who signed a union authorization card on January 31 at the latter's home, testimonially set forth her version of the events which transpired the following day. She related that she learned that the rest period during afternoons had been cancelled by Respondent on February 1. At the time when Callison's work break was to start that afternoon, Supervisors Glidewell and Yates approached the former's machine and urged the employees to take the break, stating "We want you girls to take your break so we can have our break. After standing on this concrete all day we need a break. You just have no idea what that few minutes, how it helps us out." Glidewell explained that she had come into Callison's area during the break because Glidewell's daughter worked in the mother's department and the latter was fearful that Roseman "would jump on her about it" if her daughter was found taking a rest pause.[10] Following this conversation, Callison entered the lunchroom. Roseman rushed into the room and shouted that "We were committing mutiny and acting like we were on a strike, for us to get back on our machines in three minutes." One of the girls inquired whether the employees could enjoy the break on their own time and Roseman

10. Beverly Callison testified without contradiction and I find that, toward the latter part of January, she spoke to Billy Jo Bowers, the daughter of Glidewell, who operated a sewing machine immediately in front of Callison. During their conversation, Callison apprised Bowers that the former had been active in soliciting Respondent's employees to join the Union and asked for Bowers' opinion as to her organizational desires. Bowers expressed a preference for unionization but was apprehensive about actively supporting this endeavor because she feared that her mother might lose her job if Bowers did so.

replied in the negative. After further shouting, he informed the girls that "You're all fired," and he proceeded to clock them out as they departed the plant.

Finally, Beverly Callison testified that she had been informed by some of the girls on the morning of February 1 that the break had been eliminated. That afternoon, she and some of her fellow workers went into the lunchroom for a break and, while they were drinking cokes and smoking, Roseman appeared. Turning to the girls, he informed them that "He was going to sue us, that this was mutiny, it was a wildcat strike, and that he was going to get rid of all of us, but right at that moment to get back to our machines." Following this discussion, the employees returned to work. However, moments later other groups of employees commenced to take their breaks. Learning that Roseman had discharged these individuals, Callison and several other employees sought out Roseman and told him "We'd like to discuss this with you. Why are you firing these girls, for something you know the rest of us have *done already.*" *Roseman's response was,* "There is nothing to discuss, I am firing you anyway." After clocking her timecard, he ordered her to "get out." It is Callison's uncontroverted and credited testimony that, as she was vacating the plant premises in compliance with Roseman's order, she was accosted by Foreman William Tony who grabbed her by the arm and told her "that I was a troublemaker, that I had organized these women, that I didn't work; I had strolled up and down the aisle, and that I didn't have the guts not to stand up by myself, that I had to organize all the women in the plant, that I didn't have the guts enough to do anything myself, and that if he had his way I would never ever set foot in the factory again."[11] Round-

11. Tony was not summoned as a witness in this proceeding.

ing out her testimony on this episode, Callison stated that she observed Roseman clock out countless cards on this afternoon and that during her 8 years of employment with Respondent she had never known him to clock an employee out unless the employee was being discharged.

For his part, Phillip Roseman testimonially denied that he discharged anyone on February 1. According to him, several employees read his published notice banning the afternoon break and they discussed this subject with Roseman "jokingly" and showed no "remorse" over its loss. He confessed, however, that he barricaded the lunchroom on February 1 to deny its use to his employees and allowed as how he had punched out between six and eight timecards on that date. He then admitted that he clocked out in the neighborhood of 40 to 45 cards, but failed to offer any explanation for this action and, indeed, acknowledged that the employees whom he clocked out were not compensated by Respondent following their departure from the plant. Although Respondent called approximately six employees to testify on its behalf, all of whom were present in the plant on February 1 and observed the events of that day, not a single one controverted the testimony of the foregoing witnesses that they were told by Roseman that they were discharged for having protested the elimination of the work break, nor did a single one support his contrary assertion. In short, I find that Respondent's employees, including the 19 whose names appear in a marginal reference above, learned that Respondent had withdrawn the afternoon rest period commencing on February 1 and proceeded to the lunchroom to protest and discuss this unilateral change in their working conditions. I further find that, with the exception of Claudia and Ed Bing, these employees were informed by Roseman that his decision to curb the break was unalterable, that he

would not negotiate the matter with them, that they were mutinous and were engaging in a strike, and that he ordered them to return to work. I find that, when certain employees, including those referred to above, and again excluding Claudia and Ed Bing, declined to perform their duties unless Roseman considered their grievance, they were told that they were discharged and Roseman accomplished this personnel action by clocking them out. I also find that, while Claudia and Ed Bing were not discharged by Respondent on February 1, they voluntarily joined in common cause with the other employees who were discharged for registering their opposition to the loss of the break on that date, and for this reason left the plant.

Respondent argues that it was privileged to terminate the employees who left their work on February 1 because this constituted an act of insubordination and hence was not an activity protected under the Statute. This argument lacks legal tenability. On that date, some 50 employees objected to the elimination of the afternoon rest period, most assuredly a "condition of employment" within the purview of the Act, and sought to discuss its recoupment with Phillip Roseman by visiting the lunchroom for that purpose. Roseman refused to entertain their grievance and summarily ordered them back to work, whereupon the employees persisted in their effort to persuade him to reconsider his decision. This led to their discharge and they left the premises. Claudia and Ed Bing, while not terminated by Roseman, made common cause with their fellow employees by adopting their protest and quitting work. It is now well settled that such conduct is protected activity within the meaning of Section 7 of the Act and an employer may not punish his employees for indulging in such activity unless it is removed from the protection of

the Act for some reason.[12] I perceive no such reason in this case. Accordingly, I find that the 19 employees named in the complaint[13] were engaged in a protected, concerted activity when they protested the curtailment of the work break on February 1 and ceased work on that date. I therefore conclude that, by discharging them because they did so, Respondent violated Section 8(a)(1). I further conclude that Respondent also violated that Section by Tony's statement to Callison that she would be barred from employment because of her assistance to the Union.

After the employees who were discharged by Roseman, or who joined with them, departed the plant on February 1, they met outside to plot their future course of action. It is undisputed and I find that at this time Beverly Callison openly solicited the signatures of her fellow employees on union authorization cards in full view of Roseman. After discussing the prospect of drawing umemployment compensation, the workers decided to drive to Mayfield, Kentucky, for that purpose. However, before leaving, they agreed to meet at the home of employee Doris Aquino the following morning, which was situated behind Respondent's plant. On the morning of February 2, approximately 50 employees gathered at Aquino's house. With Beverly Callison acting as spokesman, they decided to telephone Nettie Roseman to discuss their rehire with her. Callison placed the call and requested that Mrs. Roseman meet with them at Aquino's residence to consider the matter, a request which she declined to fulfill. However, Nettie Roseman agreed to see them at the plant individually, but

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12. See *N.L.R.B.* v. *Washington Aluminum Company, Inc.*, 370 U.S. 9; *Wilder Finishing Co., Division of Jervis Corp.*, 138 NLRB 1017.

13. As reported heretofore, Myron Graham is not included in this group.

finally was persuaded to meet with them as a group. In the course of this conversation, the elimination of the break was discussed and Nettie Roseman mentioned that she had no intention of restoring it. The colloquy terminated by Roseman's extension of an invitation to them to come to the factory on the next morning.

Following this telephone conversation, a group of the women decided to drive to Paducah, Kentucky, to lodge unfair labor practice charges against Respondent, mistakenly believing that the Board's offices were located there. It is undisputed and I find that, upon their return to Acquino's house on February 2, an employee dropped in to advise that Mrs. Roseman had rehired several of the employees who had been clocked out by Phillip Roseman the preceding day, and that these rehired employees had informed Nettie Roseman of the names of the girls who had gone to Paducah.[14]

The next morning, approximately 50 former workers presented themselves at the plant. According to Beverly Callison's undisputed testimony, Nettie opened the discussion by stating that the girls "had acted childish" in protesting the elimination of the rest period and walking out, and announced that "part of the troublemakers that she did not want back in her plant would not be called back."[15] Callison complained that her action in taking a break was prompted by Phillip Roseman's unavailability to commune

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14. Six girls traveled to Paducah, including Beverly and Shirley Callison, Alice Merryman, and Katy Adams, all of whom were denied reemployment on February 2.

15. Callison's testimony in this regard was corroborated by that of Laura Kaye Adams. Adams testified that Mrs. Roseman told the girls that "You will be rehired, but I want you to know there are a few in this room that will never come back in this factory again."

with his employees during the workday. Nettie then remarked that the acceptable members of the group would be individually contacted and interviewed to return to work and that the remainder would not be reemployed. According to Callison's further testimony, either on February 3 or February 6, she visited the plant to receive her paycheck which bore the notation "Paid in Full," which was given to her by Supervisor Dorothy Argo without further explanation. As she stood on line to receive her pay along with other former employees, she overheard Mrs. Roseman remark that anyone who wished to discuss their future reemployment with her could do so. Turning to a girl on the line, Callison reported this intelligence to the former. It is the undenied and credited testimony of Callison that Phillip Roseman then approached and, clutching her by the shoulder, warned that "You are not having any of your damned meetings on my property, or signing any of your damned cards. I intend to call the police and put you in jail."[16] Informing Roseman that she had an appointment with his wife, Callison proceeded to an interview with his spouse during which the eliminated rest period and Callison's recall to work were the topics of discussion. Mrs. Roseman once more pointed out that it was "childish" to protest the loss of this working condition and that it would never be restored.[17] Attention turned to Callison's rehire, and Nettie Roseman stated that the former's employment rested in her husband's hands. Roseman and Plant Manager Holcomb were then summoned and, after a review of Callison's work performance, it was agreed that she was a good worker who had always made produc-

16. This testimony was corroborated by Shirley Callison.

17. It is undisputed and I find that Respondent restored the break in February because of the furor which its curtailment had caused.

tion and against whom no complaint had ever been registered.[18] However, Roseman insisted that there was no work available for Callison because she had been replaced, although the latter testified without contradiction that no one was operating her machine on that day and that, while an individual named Gladys Crittendon had been employed for 2 days during Callison's termination, this work proved too difficult and Crittendon quit work and was not replaced.[19] The interview concluded with Roseman stating that Callison was a "troublemaker."

In further pursuit of her job, Callison telephoned Supervisor Glidewell on the evening of February 8. It is the former's testimony that she inquired why other girls in her department were being rehired while the Rosemans refused to even discuss reemployment with her. Glidewell replied that "They knew that the girls were trying to organize the union and they knew that I was, you know, one of the main organizers." Glidewell continued, "I don't want to know whether you are or not . . . Phil and Nettie say you are. . . . If you are even I don't want you to come back. . . . They will never hire you because they say you are a union organizer in the plant." In her testimony, Glidewell conceded that she received such a call from Callison in which the latter stated that she was being barred from the factory because of her efforts on behalf of the Union. While Glidewell proclaimed that she told Callison that she "knew nothing about the Union," she grudgingly admitted that the Rosemans made reference

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18. I credit Callison's testimony in this regard in view of Phillip Roseman's evaluation of her work abilities as "satisfactory."

19. Callison testified without contradiction and I find that Supervisor Glidewell had advised her that Callison's job had not been filled.

to the Union campaign to her. Glidewell's demeanor as a witness, as well as the content of her entire testimony, was not impressive. I credit Callison's testimonial utterances.[20]

Based upon the foregoing credited testimony, I find that Respondent violated Section 8(a)(1) by Phillip Roseman's statement to Beverly Callison that she would be prohibited from soliciting membership in the Union on company property without regard to the time and place of such solicitation,[21] and by Mildred Glidewell's warning to Callison that the latter would never be rehired by Respondent she was a "union organizer in the plant."

On February 10, and on several dates during the months of February and March, Callison persisted in her quest for reinstatement but was unable to speak with the Rosemans except on one occasion. In late February, she managed to see Nettie Roseman and was told not to visit the factory any more because "She [Nettie] had no intention of rehiring me, she didn't want me in her plant, and she didn't want the rest of the girls that had been fired and still fired in her plant. She told me that the only way that we would ever come back in her plant was at some later date if her lawyers advised that she would have to rehire us we would be rehired. Until that time there would be no need of bothering her." Rounding out her testimony, Callison stated that she received a termination slip from Respondent which indicated that she had been discharged for insubordination and, for this reason, she was denied unemployment benefits after a hearing before a referee of the Kentucky Division of Unemployment Insurance. By

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20. For similar reasons, I credit Callison's testimony that Glidewell exhorted the girls to take their break on the afternoon of February 1.

21. See *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615.

letter dated August 22, Callison made her final plea for reinstatement. This letter, like her other pleas, went unanswered, despite the fact that Respondent continuously advertised for help through various news' media from the date of her discharge.

Claudia Bing testified that she and her husband, who, together with her daughter Peggy had signed union authorization cards on the evening of January 31, returned to the plant on February 2 in company with 40 other former employees where they spoke to the Rosemans about returning to work. Mrs. Roseman told the group that "She'd let us come back to work when she needed us." Bing steadfastly maintained that the Rosemans did not offer immediate reinstatement to the group or any individual in it. The Bings then met separately with the Rosemans, and Plant Manager Holcomb was summoned to the conference. Holcomb reported to Ed Bing that the latter had been replaced and that Ed would be recalled to work when the occasion warranted it. Neither of the Bings were again reemployed by Respondent.

Holcomb and Mrs. Roseman claimed that they begged the Bings to return to work on February 2 but that the latter declined the offer. I do not credit this testimony. Holcomb averred that he personally proffered reinstatement to Ed Bing because he believed that Ed "needed the job, and he enjoyed the work, liked the job." Yet, despite his admirable qualities, and the fact that Holcomb had to "shuffle the factory around" to cover Bing's absence, and the further fact that Holcomb could "use" Ed, Respondent never once again attempted to contact either him or his wife. Claudia Bing was an earnest and forthright witness who impressed me as consciously attempting to speak the truth from the witness box, and I credit her testimony.

Alice Merryman credibly testified and I find that she returned to the plant on February 2 to seek reinstatement. Meeting Phillip Roseman, she inquired whether she had been discharged and he answered in the affirmative. She returned to the factory on February 10 and was again told that she had been terminated. When Merryman commented "I guess that means I can draw my unemployment," Roseman replied "You seem to know so much about the law, go find out."

Phillip Roseman and his wife testified that all employees who presented themselves at the plant on February 2 were offered unconditional reinstatement to their former positions. I find their testimony too fraught with implausibilities and internal contradictions to warrant credible acceptance. Roseman avowed that he began rehiring employees on the above date, that he offered reinstatement to them "as they were coming out" of the plant, and that he "requested several of them to go back to work immediately." When questioned as to why he had not reinstated all of the employees on that date, he responded that "They didn't want to come back to work." I cannot believe that testimony. Roseman acknowledged that he had received letters from Beverly Callison and approximately fifteen other former employees which were written by Callison at the behest of the Union seeking reinstatement. However, upon delivery of Callison's, as well as the other letters by the postman, Roseman refused to accept them, giving the curious explanation that "I didn't want to become involved in anything I wasn't familiar with without proper advice of counsel." Callison's testimony stands undenied that on several occasions after February 2 she visited the plant in search of reinstatement and that her quests were ignored by the Rosemans. Supervisor Glidewell admitted that, on or about February 4, she received a telephone call from Callison in which the latter's availability for work

was made manifest. Moreover, it is undisputed and I have found that Nettie Roseman stated on February 2 that she would not retain those former employees who were "troublemakers." Accordingly, I find that Respondent did not offer unconditional reinstatement to the 19 individuals in question when they reported to the plant on that date.

Both Phillip and Nettie Roseman insisted that their decision to eliminate the work break on February 1 was arrived at prior to their receipt of any knowledge that the Union was actively engaged in enlisting the collective support of their employees. Inasmuch as the Union campaign was not formally launched until the evening of January 31, and in the absence of any probative evidence on this record which demonstrates that the Rosemans were aware of the inception of the campaign on that night, I am willing to accept their testimonial assertions and I find that the curtailment of the rest period was not prompted by antiunion considerations. However, I am convinced and find that the Rosemans became possessed of this knowledge, as well as the identity of the employees who were in the forefront of the Union drive, on and after February 1. Thus, it is uncontradicted that Roseman learned of the Union's organizational efforts on February 1 or 2 when employees informed him that authorization cards were being distributed and signed in the plant. While Roseman denied that the name of Beverly Callison or any other name had come to his attention, it is undisputed that, when Callison walked out of the plant on February 1, Foreman Tony accused her of organizing "all the women in the plant" and warned that she "would never ever set foot in the factory again," and Roseman did not deny that Tony had told the former that Callison was a "troublemaker" who instigated the February 1 walkout. Moreover, it is uncontroverted that on February 3 or 6 Phillip Roseman warned Callison against "signing any of your damned cards" on

pain of being jailed. Furthermore, Glidewell admitted that she received a telephone call from Callison shortly after the walkout during which the latter indicated that she was an active union adherent. In view of Phillip Roseman's testimony that he makes it a point of keeping abreast of developments at the plant, and that in his estimation a union causes "trouble" when it organizes a factory, I am unable to believe that Callison's union activities at all times on and after February 1 were foreign to his ken. Nor am I convinced that Respondent was unaware of the identity of the other union sympathizers and the extent of their activities. As indicated heretofore, Roseman admittedly was kept apprised of the Union campaign by several of his employees and Mrs. Roseman learned the names of the individuals who left Doris Aquino's home on February 2 to lodge unfair labor practice charges against Respondent with the Board, a group which included Beverly and Shirley Callison, Alice Merryman, and Katy Adams. Moreover, Mrs. Roseman was clearly aware that Bevery Callison was the leader and chief spokesman for the employees who walked out on February 1 because the latter telephoned Nettie Roseman to request an audience with her on behalf of the girls, and Nettie knew that Aquino was a prime movant in this cabal because the protest meeting was held at her residence.

On the basis of the foregoing, and the entire record made in this proceeding, I am convinced and find that Respondent failed and refused to reinstate Beverly Callison, Shirley Callison, Katy Adams, and Alice Merryman on February 2, despite their unconditional offers to return to work on that date, because they were ardent, known, union activists,[22] and because Respondent was opposed to their

22. The record discloses that Katy Adams was reinstated on some undisclosed date thereafter.

efforts to unionize the plant.[23] By so doing, I conclude that Respondent violated Section 8(a)(3) of the Act.

I turn next to a consideration of the terminations of Doris Aquino and Maycel Phipps, and to other individual acts of interference, restraint and coercion in which Respondent is alleged to have indulged.

Aquino, at whose home the employees met in February to discuss their grievance, quit work with her fellow employees on February 1. On February 3, she visited Roseman's offices to obtain her paycheck and was told by Nettie Roseman that any employee who desired reinstatement would be required to speak to her individually. Mrs. Roseman then remarked that she would make certain that none of the employees who quit work on February 1 would draw unemployment compensation during the absences.[24] Seeking reinstatement, Aquino submitted to a personal interview with Mrs. Roseman during which the latter "asked me why did I act so childish by walking out, what did I think I'd gain." At the conclusion of the conversation, Aquino was offered and accepted reinstatement and resumed work on February 6.

Aquino testified that, while at work on February 9, Phillip Roseman delivered an address over the public ad-

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23. Mrs. Roseman made no secret of her antipathy for labor unions when she replied to a series of questions that "I don't think we need a union in Hickman. . . . I don't think they [the employees] need a spokesman. I think people themselves can speak for themselves." Phillip Roseman also expressed similar sentiments.

24. Both Phillip and Nettie Roseman admitted and I find that they informed their employees that Respondent would oppose their application for unemployment compensation benefits for having protested the elimination of the break and for refusing to return to work on February 1 unless the break was reinstated. I conclude that, by the foregoing conduct, Respondent violated Section 8(a)(1) of the Act.

dress system. During his speech, he stated that he was sorry for what had occurred during the preceding week, "about the walkout and the people getting fired and we should be careful of anything we signed pertaining to the Union, and just because we were working on a contract didn't mean that he could not shut that plant down. He said that there were rumors that a union was trying to come into his factory, and that anybody caught passing out cards would be replaced and that he had fired the one that had started that union and he didn't think he would have any more trouble." Roseman added that, if the Union succeeded in organizing the plant, those employees who were receiving $1.50 per hour would be paid at a lower scale. He concluded by mentioning such subjects as benefits, insurance, and enlarging the plant.

Roseman admitted delivering the aforementioned speech during which he informed his employees that they did not need the Union in the plant. With a burst of commendable candor, he also conceded that he informed the employees that "We would close the plant" despite the Government contract upon which he was working, and that he was trying to keep the Union out. Moreover, he did not deny that he informed the workers that their wages would be decreased if the Union came in. Accordingly, I credit Aquino and find the facts to be as she testimonially portrayed them. Based thereon, I conclude that Respondent violated Section 8(a)(1) of the Act by Roseman's statements that he would shut down the plant if the employees signed union cards, that he would replace any employee who was caught distributing union cards, and that the hourly wage rate would be decreased if the Union successfully organized the factory.

Continuing the narrative concerning Aquino's employment, she had first been hired by Respondent in 1964 and,

after a leave of absence, returned to work, apparently in June 1966. Although she walked out on February 1 with her fellow employees, she was rehired, as heretofore chronicled, on February 6. On the morning of February 22, she reported for duty after a 2-week bout with influenza only to notice that her timecard was not in its accustomed slot. As this was the first time that this had happened to her, she approached Foreman Tony to inquire into the reason for this happenstance. It is undisputed and I find that, in the course of her ensuing conversation, Tony announced that Aquino had been discharged on instructions from Nettie Roseman because of "absenteeism." Aquino protested that she had absented herself during the prior 2-week period due to the flu, and reminded Tony that "I called in every time, every day that I was sick and was not here." Tony repeated, "Well, Nettie told me to fire you, that we didn't need you anymore," to which Aquino replied, "Well, I'll just draw my unemployment." Tony retorted, "No, you won't. You know how she [Nettie] feels about that, too." Aquino testified without denial that, with the exception of her absence due to illness in February, she had never been absent for any regular, extended periods of time and had never been warned or reprimanded by any company official for this conduct during the entire course of her employment with Respondent.

As indicated above, Tony was not called as a witness. Despite Tony's claim, as recounted by Aquino, that Mrs. Roseman caused Aquino's discharge for alleged absenteeism, Plant Manager Holcomb sought to explain the reasons for this personnel action, contending that he alone made the decision to sever Aquino's employment ties on February 22. His testimony in this regard is, to say the least, illuminating. Holcomb testified that he was himself away from the factory on that date and, yet, he somehow learned that she had been absent on February 22.

However, he nevertheless "wondered about her absenteeism," and this prompted him to instruct Foreman Tony to discharge Aquino because he had not received any word from her. According to Holcomb, he had warned Aquino on two occasions that "I know of" that her absenteeism would not be tolerated, but then was unsure when these warnings were given, and finally admitted that he had no idea whether Aquino had absented herself prior to February 22. When asked to explicate Respondent's policy regarding absences from work, Holcomb stated that if the employees called in or otherwise sent word that they would not be available for duty because of illness, or otherwise, "that is fine" and they are retained on Respondent's payroll regardless of the length or regularity of such absences. Although Holcomb initially insisted that Aquino had been terminated for failing to notify Respondent of her absence prior to February 22, he ultimately brought himself to admit that "One time she told me that she was sick. I don't know whether it was the flu or not, and she sent word in by her mother (who worked for Respondent) that she was sick on one occasion, and on another occasion I think it was—well, several occasions she was sick, but I didn't know it was the flu."

I do not credit Holcomb's testimony that he singled Aquino out for discharge because she had persistently absented herself from work and failed to report to him during her siege of the flu. In the first place, Holcomb admittedly was not even present in the plant on February 22 when she returned to duty after her illness. Moreover, Holcomb conceded that Aquino dutifully contacted him during her infirmity, a factor which by his own admission would have excused her absences under Respondent's personnel policies.

Aquino, to Respondent's knowledge, had sheltered the group of employees who concertedly left work on Febru-

ary 1 in protest over the elimination of the afternoon break at her home on February 2 where Beverly Callison and other union proponents decided to and did telephone Nettie Roseman to arrange for a meeting to discuss the situation. To be sure, an employer may discharge an employee for cause or no cause at all, provided that a reason for the separation is not associated with a motive proscribed by the Act. Here, Respondent contends that it terminated Aquino's employment *solely* because of her absenteeism. As it is made patently clear from Holcomb's testimony that Aquino's conduct in checking in with Respondent during her illness in the month of February satisfied Respondent's personnel policies and thus immunized her against discharge, I am persuaded and find Aquino's termination can be associated with no other reason than that she had allied herself with known union adherents and had joined with them in protesting Respondent's curtailment of the rest period. I therefore conclude that, by discharging Aquino, Respondent violated Section 8(a)(3) and (1) of the Act.

The discharge of Maycel Phipps is a parallel to Aquino's. Phipps first went to work at the plant in August of 1966 and was continuously employed until her discharge on April 6. She executed a union authorization card around April 1, and had successfully solicited approximately two employees at the factory prior to her termination. Phipps testified that, on March 16, she spoke to Phillip Roseman concerning a loan from the factory outlet store. According to Phipps' testimony, Respondent maintains a policy of providing loans to its employees up to a limit of $25 and, due to the advent of Easter, she desired an advance to buy some items for her children for the holidays. Roseman assured her that she could obtain "as much as $50 at once" and offered to extend as much credit "as you want because you are one of our old hands and have got steady work." Because she was aware of Re-

spondent's restrictive loan policy, Roseman's generosity surprised Phipps. Following his approval of the loan, and according to Phipps' further testimony, Roseman "asked me would I go out and talk to some of the girls about the Union. I told him I thought it had gone too far to talk to anyone about it, because there had been some cards signed," to which Roseman responded that "We didn't need the damned union." Roseman then remarked that he intended to offer his employees a free ambulance service, extended insurance benefits, a more commodious lunchroom, and an enlargement of the plant, promises which Roseman had previously made around the middle of February in a speech to the workers in the factory.

In his testimony, Phillip Roseman denied that he requested Phipps to speak to the girls about renouncing the Union. When questioned as to whether he had told Phipps that she could receive increased credit at the factory outlet store, Roseman again entered a denial, stating "Nothing to do with that whatsoever. There was no relationship. That is automatic." Phipps impressed me as an honest witness and I perceive no reason for disbelieving her. I therefore credit her testimony in this regard.

With respect to Roseman's announcement of the promise of additional benefits such as free ambulance service, extended insurance benefits, and a better lunchroom and plant facilities, Roseman acknowledged that he made these matters known to the employees in three speeches which he made beginning in February. However, Roseman proclaimed that these added benefits were programed well in advance of the advent of the Union. While it is true that Respondent mailed a letter to its employees in November 1966 which recited that "Within the very near future, we are planning a series of meetings with various departements [sic] throughout the plant in an ef-

fort to determine with you exactly what would be the best areas for over all improvements," not a single mention was made in the document of any specific benefit or emolument which Respondent had under consideration. Testimonially, Roseman insisted that he had promised his workers as early as November 1966 an additional holiday and yet he was unable to recall what holiday it was. With respect to his promised enlargement of the plant, Roseman sought to explain this away by stating that "That has been common knowledge for 6 years. The town raised the money several years ago for the enlargement. It still is waiting, still pending." I fail to understand why, if as Roseman claimed, the plant expansion was "common knowledge," he should have chosen to remind his employees of this known fact at a time when he first heard the tocsin of unionization. In short, I am convinced and find that Roseman elected to promise his employees free ambulance service, an improved insurance program, a new lunchroom, an extra holiday, and the enlargement of the plant, only after he had learned that the Union was making headway among his employees and that, by promising these benefits, he hoped to wean them away from that labor organization. I therefore conclude that, by holding out these benefits to his workers, Roseman and Respondent violated Section 8(a)(1). I further conclude that Respondent violated the same Section by Roseman's attempt to utilize the services of Phipps to persuade her fellow employees to reject the Union, and by his promise to advance to Phipps an open credit line.

Returning to the discharge of Phipps, she further testified that she had been absent from work about 1 day each week ever since she was employed by Respondent and had never been reprimanded for doing so or informed that she would be discharged on account of her absences. Sometime in February, she stayed at home for 2 weeks because

of an accident suffered by her two daughters. On April 3, she informed her forelady, Supervisor Ruth Yates, that she was suffering from a sore throat and that she would not report for work the following day because of this affliction. It is uncontroverted and I find that Yates stated that it was perfectly permissible for Phipps to be off from work on April 4. On the following day, Respondent sent word with Phipps' daughter not to return to her duties until April 6 because production had slackened and there was no work for her. On April 6, Phipps returned to the plant. When she went to the timeclock, she observed that her timecard had been pulled and she proceeded to the office to inquire into the matter. Phipps met Plant Manager Holcomb and asked what had happened to her card, and the latter replied "I'll tell you why you don't have a card. You're fired." When Phipps queried Holcomb as to the reason for her discharge, Holcomb stated "too much absentee." On three occasions thereafter, Phipps visited the factory and spoke to Phillip Roseman about returning to work. On the first two of these occasions, Roseman informed her that "the doors wasn't closed to me" and that some day she would be reemployed. It is undisputed that, on her last visit, she mentioned to Roseman that she had received some papers from the Board and stated that she would rather have her job back than sign the papers because she needed work. Phipps asked Roseman for his advice as to whether she should sign the papers, to which he replied that "it wouldn't matter one way or the other what I did with them." Thereupon, Phipps filled out the papers and mailed them to the Board.

Holcomb testified that he alone made the decision to discharge Phipps on April 6 because of her record of absenteeism.[25] At the outset of his testimony, Holcomb re-

25. Phillip Roseman insisted that Roseman discharged her.

lated that Phipps had been absent quite a bit in March and that he had given her two warnings because of this. On April 6 when Phipps failed to appear for work, he decided to terminate her because she did not notify Respondent that she would not report for duty. However, Holcomb then testified that under Respondent's policy employees are given one warning for failure to call in when they absent themselves, which would place Phipps' second offense, by an interpolation of his testimony, in April. Holcomb then confessed that he could not remember whether Phipps telephoned the plant on April 4 to report her sickness and could not even remember her earlier absences or whether she had in fact been absent in April when he discharged her.

I am convinced that Phipps' termination for absenteeism was a cloak to shield an illegal reason for her discharge. Phipps testified that she telephoned Supervisor Yates to report her proposed absence due to illness on April 3. Although Yates was summoned by a witness on behalf of Respondent, she failed to controvert Phipps' testimony in any respect. Moreover, Holcomb acknowledged that he had learned that Phipps' absence for 2 weeks in February was due to an accident which befell her daughters and that he "took this into consideration" when he discharged her. In light of the foregoing, and in view of Holcomb's inability to pinpoint whether and when he actually did reprimand her for absenteeism, I credit Phipps' testimony and find that she had never been warned by Holcomb or any other company official to curb her absences or that she would be discharged for failing to report them.

Phipps had been solicited by Phillip Roseman to speak to her fellow employees to dissuade their adherence to the Union and Phipps responded with a distinctly unenthusiastic reply when she stated that "it had gone too far to

talk to anyone about it, because there had been some cards signed." Moreover, this response made it clear to Roseman that Phipps was privy to certain intelligence regarding the Union's campaign, intelligence which could have reasonably led him to believe that Phipps might have been involved in that drive. Furthermore, it is undenied that Phipps successfully solicited two employees at the plant prior to her separation. In view of Roseman's testimony that he was informed by certain of his employees concerning such solicitation, I deem it also reasonable to infer that Roseman learned of her activities in this regard. Accordingly, I find that Phipps was discharged on April 6, not because of any record of absenteeism, but because Respondent knew or suspected that she was espousing the Union's cause. I conclude that Respondent thereby violated Section 8(a)(3) of the Act.

Employee Monnie Sue Campbell testified that she had observed Supervisors Glidewell, Yates and Argo distributing anti-Union leaflets to employees in March and April. She testified that she had been a friend of Glidewell's for about 10 years and, on March 22, engaged in a conversation with Glidewell while at work. According to Campbell, Glidewell "told me that someone was telling that I was passing out union cards and collecting them, and she also told me that it was a rumor that I was missing a day's work to meet with the Union's officials. She felt that I would probably deny the fact that I was, had anything to do with the Union." When called to the witness stand and questioned as to whether she had spoken to Campbell about the Union, Glidewell claimed, "The Union was not mentioned, as far as the Union as a whole. I told her that I thought she was getting accused of a lot of things that she wasn't doing, but there was nothing said about the Union between she or I." I cannot be led to believe that

Glidewell failed to mention the Union in this conversation, not only because I deem it implausible that she would have deliberately attempted to keep a treasured friend in the dark about an accusation which might jeopardize Campbell's job, but also because Glidewell tipped her hand when she testified that she felt that [Campbell] was a strong loyal company employee." Accordingly, I find that Glidewell initiated this conversation to draw Campbell out as to her relationship with the Union and that this constituted a form of interrogation. I conclude that, in the context of this case, this interrogation was coercive and violative of Section 8(a)(1).

Concerning the leaflets to which Campbell adverted in her testimony, Phillip Roseman testified that, on or about February 8, his supervisors began distributing handbills to the employees. This handbill, which was introduced into evidence, advised the employees that "Your signature is valuable—warning—do not give it away." It went on to state, "Refuse to sign anything unless you know exactly what will be done with *your signature* and how it will affect *you*!" The circular contained a series of questions and statements including, "Will it involve me in UNION Trouble?", and "Demand a written guarantee that your signature will not be used for something that could work to your possible harm." The General Counsel contends that this handbill, containing these inscriptions threatened employees with "trouble, possible violence, and loss of pay checks and jobs" if they selected the Union as their bargaining, and therefore violated Section 8(a)(1). I am not convinced that these legends verbally portray the dire results which the General Counsel draws from them. Accordingly, I shall dismiss this aspect of the complaint.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I have heretofore found that Respondent discharged Beverly Callison, Katy Adams, Christine Levy, Frankie Williams, Peggy Bing, Alice Merryman, Jo Ann Burchman, Geneva Duty, Lavada Mansfield, Shelby Parnall, Shirley Callison, Jimmy McClure, Pat Lowery, Glenda Edgin, Nita Stowe, Doris Aquino, and Maycel Phipps on February 1, 1967, because they engaged in protected, concerted activities. I shall therefore recommend that Respondent offer them, to the extent it has not already done so, immediate and full reinstatement to their former or substantially equivalent employment and make them whole for any loss of pay they may have suffered by reason of the discrimination practiced against them, by payment to them of a sum equal to that which they normally would have earned from the date of discrimination to the date of offer of reinstatement, less their net earnings during said period. The backpay provided herein shall be computed in accordance with the Board's formula set forth in

F. W. Woolworth Company, 90 NLRB 289, with interest thereon at the rate of 6 percent per annum in the manner prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

I have also found that Claudia Bing and Ed Bing voluntarily left their employment on February 1, 1967, to join in common cause with the employees whose names are set forth in the paragraph immediately above, and were not discharged on that date. However, I have found that they applied for unconditional reinstatement with Respondent on February 2, which was denied to them. As the Bings withheld their services to protest the commission of unfair labor practices by Respondent when it separated their fellow employees for engaging in protected, concerted activities they occupied the status of unfair labor practice strikers who were entitled to reinstatement upon their unconditional request. Accordingly, I shall recommend that Respondent offer to Claudia and Ed Bing immediate and full reinstatement to their former or substantially equivalent employment, displacing any replacements hired since February 2, 1967, and make them whole for any loss of pay they may have sustained by payment to them of a sum of money equal to that which they normally would have received from the date of denial of reemployment to the date of offer of reinstatement, less net earnings during that period. Their backpay shall be computed in the same manner as set forth above, with interest computed thereon as provided for in *Isis*.

I have further found that Respondent discriminatorily discharged Doris Aquino and Maycel Phipps on February 22, 1967, and April 6, 1967, respectively. I shall accordingly recommend that Respondent offer them immediate and full reinstatement to their former or substantially equivalent positions and make them whole for any loss of

pay they may have suffered as a result of the discrimination from the date of the discharges to the date of their reinstatement, less net earnings during said period. Their backpay shall be computed in the same manner as described in this section.[26]

Because of the nature and extent of the unfair labor practices engaged in by Respondent, which evince an attitude of opposition to the purposes of the Act in general, I deem it necessary to recommend that Respondent cease and desist from in any other manner infringing upon rights of employees guaranteed in Section 7 of the Act.

Upon the basis of the foregoing findings of fact and conclusions, and upon the entire record in the case, I make the following:

Conclusions of Law

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Beverly Callison, Katy Adams, Christine Levy, Frankie Williams, Peggy Bing, Alice Merryman, Jo Ann Burchman, Geneva D[illegible], Lavada Mansfield, Shelby Parnall, Shirley Callison, Jimmy McClure, Pat Lowery, Glenda Edgin, Nita Stowe, Doris Aquino, and Maycel Phipps, and by failing to recall some of them, and by declining to reinstate Claudia Bing and Ed Bing, thereby discriminating in regard to their hire and tenure of employment, in order to discourage member-

26. Both Aquino and Maycell are also entitled, of course, to backpay from February 1, the day they were discharged for protesting the elimination of the rest period, until the date or dates of their reinstatement.

ship in and activity on behalf of the Union, and/or to discourage their engagement in concerted activities protected under Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. By interfering with, restraining and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent has also engaged in and is engaging in independent unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this proceeding, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend that Respondent, Hickman Garment Company, Hickman, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in and activities on behalf of the Amalgamated Clothing Workers of America, AFL-CIO, or any other labor organization of its employees, by discharging employees, or discouraging their participation in protected, concerted activities by discharging them and refusing to reinstate employees who have done so, or in any other manner discriminating in regard to hire or tenure of employment, or any term or condition of employment.

(b) Requesting employees to solicit other employees to renounce the Union; coercively interrogating employ-

ees; threatening employees that they would be prevented from drawing unemployment benefits for engaging in protected, concerted activities; threatening employees that it would close its plant if they engaged in the aforesaid protected activities; threatening employees that their wages would be reduced if they selected the Union as their bargaining agent; warning employees that they would be replaced if they distributed Union authorization cards, without limitation as to the time and place of such distribution; warning employees that they would be barred from employment for engaging in Union activities; and, promising employees increased benefits, including free ambulance service, an improved insurance program, a new lunchroom, and extra holidays, if they rejected the Union.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named labor organization, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which I find is necessary to effectuate the policies of the Act.

(a) Offer to Beverly Callison, Katy Adams, Christine Levy, Frankie Williams, Peggy Bing, Alice Merryman, Jo Ann Burchman, Geneva Duty, Lavada Mansfield, Shelby Parnall, Shirley Callison, Jimmy McClure, Pat Lowery, Glenda Edgin, Nita Stowe, Doris Aquino, Maycel Phipps, Claudia Bing, and Ed Bing, if it has not already done so, immediate and full reinstatement to their former or substantially equivalent employment, and make them whole for any loss of pay they may have suffered as a result

of the discrimination against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Notify the above-named individuals, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(c) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to ascertain any backpay due under the terms of this Recommended Order.

(d) Post at its plant in Hickman, Kentucky, copies of the notice attached hereto and marked Appendix.[27] Copies of said notice, to be furnished by the Regional Director for Region 9, shall, after being duly signed by a representative of Respondent, be posted by Respondent immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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27. In the event that this Recommended Order be adopted by the Board the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of receipt of this Decision, what steps the Respondent has taken to comply therewith.[28]

IT IS FURTHER RECOMMENDED that, except as hereinabove found, all other allegations in the complaint be dismissed.

Dated at Washington, D.C.

/s/ Max Rosenberg

Trial Examiner

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28. In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDED ORDER OF A TRIAL EXAMINER

OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

(AS AMENDED)

we hereby notify our employees that:

WE WILL NOT discourage our employees from joining or supporting the AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, or any other union, by firing any of our employees, and we will not discourage our employees from participating in activities protected by Federal Law by discharging them and refusing to reinstate them.

WE WILL NOT ask our employees to persuade their fellow workers to reject the Union.

WE WILL NOT interrogate our employees about their Union activities.

WE WILL NOT threaten our employees with loss of unemployment compensation benefits because they engage in activities protected by Federal Law.

WE WILL NOT threaten our employees that we will close the plant for engaging in lawful activities.

WE WILL NOT threaten our employees that they will receive less money in wages if they selected the Union to represent them.

WE WILL NOT warn our employees that they will be replaced in their jobs if they pass out Union authorization cards on company property during nonwork time.

WE WILL NOT warn our employees that they will not be rehired or recalled to work if they join or assist the Union.

WE WILL NOT promise our employees increased benefits, such as free ambulance service, improved insurance programs, a new lunchroom, or extra holidays, if they defeat the Union.

WE WILL NOT in any other manner interfere with the rights of our employees under the law, or force them to give up any of their rights under the law.

WE WILL offer back their jobs to Beverly Callison, Katy Adams, Christine Levy, Frankie Williams, Peggy Bing, Alice Merryman, Jo Ann Burchman, Geneva Duty, Lavada Mansfield, Shelby Parnall, Shirley Callison, Jimmy McClure, Pat Lowery, Glenda Edgin, Nita Stowe, Doris Aquino, Maycel Phipps, Claudia Bing, and Ed Bing, if we have not already done so, and give them backpay from the day they were fired or denied reemployment.

WE WILL notify these employees, if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

All our employees are free to become or remain, or refrain from becoming or remaining, members of the Amal-

gamated Clothing Workers of America, AFL-CIO, or any other labor union.

Hickman Garment Company
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2407 Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202 (Tel. No. 684-3663).

DECISION AND ORDER

On April 19, 1968, Trial Examiner Max Rosenberg issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that such allegations be dismissed. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the single exception noted in the margin herein.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and hereby orders that the Respondent, Hickman Garment Company, Hickman, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified.

At the end of paragraph 2 (a) of the Trial Examiner's Recommended Order, add the following sentence:

> Any loss of pay which Maycel Phipps may have suffered as a result of the discrimination against her shall be computed beginning with the date of April 6, 1967.

Dated, Washington, D. C. July 12, 1968.

Frank W. McCulloch, Chairman
John H. Fanning, Member
Gerald A. Brown, Member
National Labor Relations Board

(Seal)

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1. With regard to the incident of February 1, 1967, the Trial Examiner inadvertently stated that Maycel Phipps was one of the 19 protesting dischargees. However, Phipps testified that she was not at the plant on that date and the complaint does not allege February 1, 1967, as the date on which she was laid off. Consequently, her loss of pay, if any, should be computed for the period beginning April 6, 1967, the date on which her employment was terminated.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 19,356

FIRST NATIONAL BANK OF OMAHA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF ISSUE PRESENTED

Whether the Board properly found that the walkout by five employees of the Bank, in protest over terms and conditions of their employment, was concerted activity protected by Section 7 of the Act.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon petition of the First National Bank of Omaha (herein, "the Bank" or

"Employer"), to review and set aside an order of the National Labor Relations Board issued on June 7, 1968, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*). The Board, in its answer to the petition, has requested enforcement of its

* * *

unprotected where the objective of the activity contravenes the provisions or basic policies of the Act, or the provisions of a related federal statute,[4] or the means utilized involve major violence or misconduct,[5] or are otherwise plainly "indefensible"[6] by all recognized standards of conduct.[7]

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4. *American News Co.*, 55 NLRB 1302 (1944) (strike to compel wage increase in violation of Wage Stabilization Act); *Thompson Products, Inc.*, 70 NLRB 13 (1946), vacated 72 NLRB 886 (1947) (strike to compel employer to violate Board certification); *NLRB* v. *Brashear Freight Lines*, 119 F.2d 379 (C.A. 8, 1942) (strike to compel employer to recognize minority union); *The Hoover Co.* v. *N.L.R.B.*, 191 F.2d 380, 385-389 (C.A. 6, 1951) (boycott to compel employer to recognize one union while representation petition filed by another union was pending before the Board); *American Rubber Products Corp.* v. *N.L.R.B.*, 214 F.2d 24, 47, 50-52 (C.A. 7, 1954) (strike to compel wage increase which would have violated W.S.B. regulations).

5. *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), (unlawful seizure of employer's property); *Southern Steamship Co.* v. *N.L.R.B.*, 316 U.S. 31 (1942) (strike which constituted mutiny under Criminal Code); *Victor Products Corp.* v. *N.L.R.B.*, 208 F.2d 834 (C.A.D.C., 1953) (forcibly barring ingress to plant); *Hart Cotton Mills, Inc.*, 91 NLRB 728 (1950) (assault with deadly weapon); *Old Town Shoe Co.*, 91 NLRB 240 (1950) (breaking windows in nonstriker's home).

6. *Harnischfeger Corp.*, 9 NLRB 676, 686 (1938).

7. *Underwood Machinery Co.*, 74 NLRB 641, 646-647 (1947); *Elk Lumber Co.*, 91 NLRB 333 (1950), and *Farber Bros., Inc.*, 94 NLRB 748 (1951) (slowdowns); *N.L.R.B.* v. *Sands Mfg. Co.*, 306 U.S. 332 (1939), and *W. L. Mead, Inc.*, 113 NLRB 1040 (1955) (strikes in breach of collective bargaining agreement); *N.L.R.B.* v. *Local 1229, IBEW*, 346 U.S. 464 (1953) (showing unnecessary

Work stoppages which are "partial", "intermittent", or "recurrent" have been held unprotected because they produce "a condition that [is] neither strike nor work."[8] Thus, the Board and the courts have deemed it an "indefensible" tactic for employees to refuse to work on the terms prescribed by their employer and yet to remain on their jobs and thus deny their employer the opportunity to replace them with workers who will accept these terms. *International Union, U.A.W.* v. *Wisconsin E. R. Bd.*, 336 U.S. 245, 255-256 (1949); *N.L.R.B.* v. *Montgomery Ward & Co.*, 157 F.2d 486, 496 (C.A. 8, 1946); *C. G. Conn, Ltd.* v. *N.L.R.B.*,108 F.2d 390, 395-397 (C.A. 7, 1939); *Valley City Furniture Co., supra*; *Honolulu Rapid Transit Co., Ltd.*, 110 NLRB 1806, 1809-1810 (1954). Cf., *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 492-494. To countenance such conduct, the Board has said, would be to allow employees "to do what we would not allow any employer to do; that is, unilaterally determine conditions of employment." *Valley City Furniture Co., supra*, 110 NLRB at 1594-1595.

This exception to the broad guarantees embodied in Section 7 does not, however, authorize an employer to use the penalty of discharge to punish employees for engaging in a single, concerted work stoppage of limited duration in protest over working conditions. Cf., *N.L.R.B.* v. *Washington Aluminum Co., supra*, 370 U.S. at 17; *N.L.R.B.* v.

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disloyalty to employer through published attack on employer's product); *N.L.R.B.* v. *Reynolds & Manley Lumber Co.*, 212 F.2d 155 (C.A. 5, 1954) (walking off job in such manner as to create dangerous situation); *Carnegie-Illinois Steel Corp.*, 84 NLRB 851 (1949), aff'd, 181 F.2d 652 (C.A. 7, 1950), and *U. S. Steel Co.* v. *N.L.R.B.*, 196 F.2d 459 (C.A. 7, 1952) (walking out without taking adequate steps to protect plant).

8. *Valley City Furniture Co.*, 110 NLRB 1589, 1594-1595 (1954), enf'd, 230 F.2d 947 (C.A. 6, 1956).

Plastilite Corp., 375 F.2d 343, 349-350 (C.A. 8, 1967); *N.L.R.B.* v. *Buzza-Cardozo*, 205 F.2d 889, 890 (C.A. 9, 1953), cert. denied, 346 U.S. 923 (1954); *N.L.R.B.* v. *Kennametal, Inc.*, 182 F.2d 817, 819 (C.A. 3, 1950); *Electromec Design & Dev. Co., Inc.*, 168 NLRB No. 107, 67 LRRM 1067, 1069 (1967); *Wilder Finishing Co.*, 138 NLRB 1017, 1019-1020 (1962). Rather, it is only when employees adopt a continuing strategy of work stoppages or refusals to perform assigned tasks that their activity may become "indefensible" and lose its protected status. As this Court observed in *N.L.R.B.* v. *Blades Mfg. Corp.*, 344 F.2d 998, 1005 (1965),

* * *

The Bank relies (Br., p. 25) upon *Redwing Carriers, Inc.*, 137 NLRB 1545 (1962), aff'd *sub nom., Teamsters, Local No. 79* v. *N.L.R.B.*, 325 F.2d 1011 (C.A.D.C., 1963), cert. denied, 377 U.S. 905 (1964). *Redwing*, however, dealt with the discharge of employees who remained on their jobs, but refused to perform that portion of their assigned duties which required them to cross union picket lines at the premises of another employer. The Board held, with judicial approval, that the right of employees to assist a labor organization under such circumstances must be balanced against their employer's interest in preserving the efficient operation of its business. Accordingly, since the employer acted "only so it could immediately or within a short period thereafter replace them with others willing to perform the scheduled work," the discharges were not unlawful (137 NLRB at 1547).[12] Here, however, the employees walked out instead of remaining on their jobs and engaging in a partial strike. It was therefore unnecessary to discharge them in order to clear the way for replace-

12. Compare *Overnite Transportation Co.*, 154 NLRB 1271 (1956), enf'd in relevant part, 364 F.2d 682 (C.A.D.C., 1966).

ments. See, *Southern Greyhound Lines Div., Greyhound Lines, Inc.*, 169 NLRB No. 148, 67 LRRM 1368 (1968). Cf., *N.L.R.B.* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). And in any event, the Bank's action cannot be justified on the ground that it was necessary to protect the Bank's operations, since the employees returned to work the following day and did not indicate that they intended to repeat their work stoppage (R. 10; 41-42, 56, 59, 62).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition to review should be denied and a decree should enter enforcing the Board's order in full.

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October, 1968.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 346

HICKMAN GARMENT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. A1–A2) is reported at 408 F. 2d 379. The Board's decision and order (Pet. A2–A47)[1] are reported at 172 NLRB No. 118.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1969 (Pet. A1–A2). The petition for a writ of certiorari was filed on July 16, 1969. The juris-

[1] The Board's decision and order are also reprinted at J.A. 17a–61a. "J.A." references herein are to the joint appendix to the briefs in the court below. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that an employer violated Section 8(a)(1) of the Act by discharging a group of employees because they left their work stations to protest the elimination of their afternoon work break and to discuss their grievance with the employer.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et. seq.*), are set forth at pages 2–3 of the petition.

STATEMENT

1. Petitioner is owned and operated by Phillip Roseman, its president, and his wife Nettie, its secretary (J.A. 19a, 179a–180a). In 1967, the Company was engaged in the manufacture of military raincoats for the government at a plant in Hickman, Kentucky, where its work force consisted of about 250 employees (J.A. 19a; 99a–100a). These employees had been unrepresented by any union, but the Amalgamated Clothing Workers of America, AFL–CIO, began organizational efforts at the plant in early January 1967, and it solicited authorization cards from the employees on January 31 and thereafter (J.A. 20a–21a; 66a–69a).

For almost twelve years prior to February 1, 1967, the Company had permitted its employees to take a ten-minute break each morning and afternoon in four groups at staggered intervals (J.A. 21a; 72a, 101a,

115a). On January 31 and with no other advance notice, the Company announced that the afternoon break would be eliminated as of the next day because the "new national [minimum] wage affords us very little room for any breaks or interruptions which hampers our production schedules" (J.A. 21a–22a; 101a–102a, 196a).

On the afternoon of February 1, some of the employees in the second group went to the lunchroom to take their break. While they were drinking soft drinks and smoking, Company President Roseman appeared. He informed them that "He was going to sue us, that this was mutiny, it was a wildcat strike, and that he was going to get rid of all of us, but right at the moment to get back to our machines" (J.A. 28a; 73a, 126a–127a). The employees thereupon returned to work (*ibid.*).

Subsequently, employees in the fourth group decided to go to the lunchroom "to take our break and to talk to Phil [Roseman] and ask him why he was taking our break away from us" (J.A. 22a, 30a; 142a, 154a). As they approached the lunchroom, they noticed that the entrance was barricaded by benches and that Roseman and a supervisor were standing in front of the ladies' room. The employees removed the benches and entered the lunchroom in order "to talk to the man [Roseman]" about the elimination of the afternoon break (J.A. 22a; 142a, 154a). Roseman followed the employees into the lunchroom, "started flinging his hands around," and told the employees they were committing "mutiny" and acting like they were on strike (J.A. 22a; 154a, 129a–130a). When several employees

complained and attempted to question Roseman about loss of their break, he replied that there was nothing to discuss since he had already made his decision (J.A. 22a–23a; 130a, 154a). Additionally, he threatened to sue the employees and, referring to the Company's military contracts, warned "that he was going to call the Federal Government" (J.A. 23a; 154a, 142a, 130a). When one of the employees retorted, "Well, while you're at it call the National Labor Relations Board," Roseman told her that she was "fired" and punched her time clock card out (J.A. 23a; 154a, 130a).

Roseman ordered the employees to return to work, but they again urged him to compose himself and discuss their grievance (J.A. 24a–26a, 30a; 130a). Roseman refused, stating "There is nothing to talk about," and shouted "You are all fired" (J.A. 24a–26a, 30a; 130a, 142a, 147a). He then proceeded to clock the protestors out as they left the plant (J.A. 28a; 131a, 142a).

Several employees who were not in the lunchroom learned what had occurred and left the plant with the employees who had been fired (J.A. 26a; 95a, 97a–98a). One employee, Beverly Callison, who had taken her break earlier with the second section and had returned to work when ordered by Roseman to do so, sought Roseman out in a further attempt to discuss the situation. He responded by discharging her (J.A. 28a; 73a–74a).

2. The Board held that the employees' effort on February 1, 1967, to discuss the elimination of their afternoon work break with Roseman, including their entrance into the lunchroom for that purpose, was

protected concerted activity, and that the Company violated Section 8(a)(1) of the Act by discharging sixteen employees for engaging in such activity (J.A. 30a–31a, 50a–51a, 60a). The Board also found that the two employees who voluntarily left the plant to make common cause with the employees who were discharged occupied the status of unfair-labor-practice strikers and were unlawfully denied reinstatement by the Company when they sought to return to work on the following day (J.A. 51a). The Board, *inter alia*, ordered the Company to offer reinstatement to the eighteen employees and to make them whole for any loss of pay suffered as a result of the Company's unlawful conduct (J.A. 55a, 60a).[2]

The court of appeals, in a *per curiam* order, held that the Board's findings and conclusions were supported by substantial evidence on the record as a whole, and enforced the Board's order (Pet. A1–A2).

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[2] The Board further found that the Company violated Section 8 (a)(3) and (1) of the Act by failing to reinstate four of the protesters, following their unconditional request for reinstatement on February 2, because they were known union activists; and by discharging two other employees on February 22 and April 6, respectively, because of their union activities. Additionally, the Board found that the Company violated Section 8(a)(1) of the Act by requesting employees to solicit other employees to renounce the Union; by coercively interrogating employees; by various threats to employees that, if they engaged in protected activities, they would be replaced and barred from further employment, the plant would be closed, they would be prevented from drawing unemployment benefits, and wages would be reduced; and by promising employees increased benefits if the Union was not selected as bargaining agent (J.A. 52a–56a). Petitioner does not challenge these findings and conclusions (Pet. 5).

ARGUMENT

1. In the exercise of their statutory right to engage in concerted activities for mutual aid or protection, employees may walk out or stop work in protest over conditions of employment and an employer may not lawfully discharge them for such conduct. *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S. 9. Applying this settled principle, the Board, with the approval of the court of appeals, correctly found that, in stopping work to protest the elimination of the afternoon work break, the employees engaged in concerted activity that the Act protects. Petitioner's argument is that, because the employees did not strike but took the less drastic step of attempting to discuss their grievance with their employer during working hours and on Company property, they forfeited the statutory protection. But the "language of the Act does not require and its purposes would not be served by holding that dissatisfied workmen may receive its protection only if they exert the maximum economic pressure and call a strike." Nor does the fact "[t]hat the employees suddenly dropped their tools and insisted upon presenting their grievances during working hours * * * detract from the lawfulness of their conduct. * * * In fact, what the workmen did was more reasonable and less productive of loss to all concerned than an outright strike." *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817, 819 (C.A. 3). As this Court stated in *Washington Aluminum, supra,* the "activities engaged in here do not fall within the normal categories of unprotected concerted activities such as

those that are unlawful, violent, or in breach of contract. Nor can they be * * * classified as 'indefensible' by any recognized standard of conduct." 370 U.S. at 17 (footnotes omitted).

2. Contrary to petitioner's assertion (Pet. 6), there is no conflict of decisions. In *C. G. Conn, Ltd.* v. *National Labor Relations Board,* 108 F. 2d 390, 395 (C.A. 7) (Pet. 8–9), the employees refused to work scheduled overtime one evening and indicated "that they intended to do the same each evening until their request [relating to rates of pay and overtime work] was granted." *In Home Beneficial Life Ins. Co.* v. *National Labor Relations Board,* 159 F. 2d 280, 286 (C.A. 4), certiorari denied, 332 U.S. 758 (Pet. 9), the insurance agents did not join a strike conducted by other agents and continued to perform their duties, except that they refused to report to their respective offices before beginning their outside work, as required by a company rule. In *National Labor Relations Board* v. *Montgomery Ward & Co.,* 157 F. 2d 486, 496–497 (C.A. 8) (Pet. 7), clerical employees agreed not to process orders from their employer's Chicago plant, which was on strike, but continued to process all other orders. Thus, in each of these three cases the discharged employees had pursued, or intended to pursue, a continuing course of conduct whereby they would meet some of their job requirements and remain on the payroll while refusing to meet others. By contrast, the instant case presents no comparable pattern of protest activity, for the employees here merely engaged in a brief work stoppage for the purpose of protesting the elimination of the

afternoon break and presenting their grievance to their employer.[3]

National Labor Relations Board v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, and *McNeely & Price Co.* v. *National Labor Relations Board*, 106 F. 2d 878 (C.A. 3), cited by petitioner (Pet. 9–11), are inapposite. Those cases involved sitdown strikes, *i.e.*, the forceful seizure and retention of the employer's plant and property by striking employees in defiance of orders to leave. The facts here show no action of even remote similarity on the part of the employees; indeed, they left the employer's premises peacefully when directed to do so (*supra*, p. 4). Nor is *Dobbs Houses, Inc.* v. *National Labor Relations Board*, 325 F. 2d 531 (C.A. 5) (Pet. 6–7), in point.

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[3] This distinction is not inconsistent with the position taken by counsel for the Board in *First National Bank of Omaha* v. *National Labor Relations Board* (C.A. 8, No. 19,356), as petitioner claims (Pet. 11). Rather, it is precisely the same as was urged in the Board's brief there—that, on the one hand, "when employees adopt a continuing strategy of work stoppages or refusals to perform assigned tasks * * * their activity may become 'indefensible' and lose its protected status" (Pet. A51); on the other hand, however, "[t]his exception to the broad guarantees embodied in Section 7 does not, however, authorize an employer to use the penalty of discharge to punish employees for engaging in a single, concerted work stoppage of limited duration in protest over working conditions" (Pet. A50). On July 22, 1969, the court of appeals in the *First National Bank case* affirmed the Board's finding that employees who protested a requirement that they work overtime by walking off their jobs an hour early were engaged in protected activity for which they could not be lawfully discharged (71 LRRM 3019). The court distinguished the *C. G. Conn*, *Home Beneficial Life*, and *Montgomery Ward cases*, *supra*, on substantially the same grounds as we suggest here (slip opinion, pp. 4–6, 71 LRRM at 3020–3021).

There, unlike here, the court concluded that the employees' protest was directed, not to their own terms and conditions of employment, but to the discharge of a supervisor and was, therefore, not protected activity. 325 F. 2d at 537, 539.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 346

HICKMAN GARMENT CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 346

HICKMAN GARMENT CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI

STATEMENT

This Supplemental Petition for a Writ of Certiorari is submitted for the sole purpose of bringing to the attention of this Court a decision of the United States Court of Appeals for the Fourth Circuit not available at the time the Petitioner's brief was printed and submitted to this Court.

The explanation follows below:

AUTHORITIES

In *Cone Mills Corp.* v. *N.L.R.B.*, ... F.2d ..... (C.A. 4, 1969) 71 LRRM 2916, the Court had occasion to consider a question almost identical to the one posited in our Petition for Certiorari, and factually similar to our case in almost every relevant respect. Eight employees of the Cone Mills Corp. engaged in an "in plant work stoppage" to protest the discharge of a fellow employee. The Court found that the employees were instructed to return to work or take their protest outside the plant, the employees refused and were then *lawfully* discharged.

Admittedly the employees in our cause were not told to take their protest off of the Company premises but this was irrelevant to the decision in the *Cone Mills Case, supra*, the Court stated:

> "The Examiner, in support of his conclusions, cited *Golay & Co.* v. *N.L.R.B.*, 371 F.2d 259 (C.A. 7, 1966), and in argument before this court on appeal Board counsel seeks support from that decision to sustain the Board's position here. It is contended that the court in Golay held that, when employees are striking on company property, it is *unlawful* to instruct them to resume work or be discharged, but *lawful* to instruct them to resume work or leave the plant and engage in the strike activity off of company property; and, if neither of these *lawful* alternatives is acceptable the employees will be subject to discharge. However, from a careful reading of Golay, the review of the findings of fact by the Examiner, the disposition of the case by the Board, and from the court's opinion it appears that the court, in fact, upheld the discharge of several employees who had been engaged in an in-plant 'work stoppage' for more than a minimal time prior to their discharge; and it does not appear that each of these

discharges was preceded by a warning to the employee to either strike off of company property or be discharged. Many employees were merely asked to return to work and upon refusing to do so or standing mute they were released."

The fact situation presented in our cause is identical in every *relevant* respect.

The aforementioned decision was issued on July 16, 1969. Petitioner's Petition for a Writ of Certiorari was filed on the same day, July 16, 1969.

CONCLUSION

Petitioner, Hickman Garment Corporation respectfully requests that the foregoing additional authority be considered by this Court in the disposition of this cause.

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OCTOBER TERM, 1969

No. 346

HICKMAN GARMENT CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONSE OF THE NATIONAL LABOR RELATIONS BOARD TO SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI

Petitioner, in a document entitled "Supplemental Petition for a Writ of Certiorari," asserts that the decision in the instant case is in conflict with that of the Court of Appeals for the Fourth Circuit in *Cone Mills Corp.* v. *National Labor Relations Board*, 71 LRRM 2916, decided July 16, 1969. In *Cone*, however, the court specifically noted that the employees were not discharged merely because they failed to stop their in-plant protest and return to work (as in the present case), but because, after the employer had considered their complaint and then told them either to return to work or to continue their "strike" off the premises, they "defiantly insisted upon carrying on

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and prolonging the work stoppage on company property during working hours." 71 LRRM at 2921–2922.[1] Indeed, in *National Labor Relations Board* v. *Hanes Hosiery Division*, 71 LRRM 2922, decided July 18, 1969, the Court of Appeals for the Fourth Circuit confirmed the limited scope of *Cone*, by sustaining the Board's findings that the discharge of an employee for organizing an in-plant work stoppage violated Section 8(a)(1) of the Act, and pointing out (71 LRRM at 2923, n. 1):

> Although both the company and the workers referred to this protest as a "sitdown," it did not involve a seizure of the plant or a refusal to leave the premises. See *NLRB* v. *Fansteel Metal Corp.*, 306 U.S. 240 * * *; *Cone Mills Corp.* v. *NLRB* * * *, 71 LRRM 2916 (4th Cir. 1969).

For these reasons, as well as those set forth in the Board's Brief in Opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1969.

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[1] The court in *Cone* also noted that the employees "had a right and an opportunity to have their protest or grievance heard and considered by top management through orderly channels at a later time," since a "grievance procedure" was then in effect; but "they were not interested in being heard." 71 LRRM at 2920.

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